SUPREME COURT. U. S.

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No. 733

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

PERMA LIFE MUFFLERS, INC.
PERMA LIFE MUFFLERS OF ARLINGTON, INC.
PERMA LIFE MUFFLERS OF PRINCE GEORGES COUNTY, INC.
PERMA LIFE MUFFLER SHOPS OF ALEXANDRIA, VA., INC.
ROBIN HOOD OF GRAND RAPIDS, INC.
ROBIN HOOD OF MUSKEGON, INC.
REGINA M. ROSS, Assignee of MAXWELL E. ROSS, t/a
ROBIN HOOD MUFFLER SHOP
REGINA M. ROSS, Assignee of MAXWELL E. ROSS, formerly t/a
MIDAS MUFFLER SHOP OF BATTLE CREEK
CLAUDE WHEELER, t/a ROBIN HOOD MUFFLER SHOPS
PIERCE MUFFLER SHOPS, INC.

PETITIONERS

v.

INTERNATIONAL PARTS CORPORATION
MIDAS, INC.
POWELL MUFFLER CO. INC.
MUFFLER CORPORATION OF AMERICA
NATHAN SHERMAN, GORDON SHERMAN, ROBERT SCHROEDER,
ROBERT M. JACOB, HAROLD KRIEGER, IRWIN LISS

RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONERS' BRIEF

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OPINIONS IN THE COURTS BELOW

The Opinion of the United States Court of Appeals for the Seventh Circuit is reported at 376 F.2d 692 (C.A. 7, 1967) and appears in the Joint Appendix at 203 et seq.

The Opinions of the United States District Court for the Northern District of Illinois, Eastern Division, are reported at paragraphs 71,801 and 71,802 in 1966 CCH Trade Cases

and appear in the Appendix at 108, et seq., and at 116* et seq.

JUDGMENTS BELOW AND JURISDICTION

This Writ grows out of a three-count[1] civil antitrust complaint which Petitioners filed in the United States District Court for the Northern District of Illinois, Eastern Division, in August, 1960 [16-45].

Petitioners appealed to the United States Court of Appeals for the Seventh Circuit. The Circuit Court [223] affirmed in part and reversed in part[2] and entered judgment on April 25, 1967. The Circuit Court denied a petition for Rehearing En Banc[3] on June 7, 1967.

This Court granted Petitioners' Petition for Writ of Certiorari on January 15, 1968.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATUTES INVOLVED

The statutes involved are Section 1 of the Sherman Act, 15 U.S.C. 1, Section 3 of the Clayton Act, 15 U.S.C. 14, and Section 4 of the Clayton Act, 15 U.S.C. 15. These statutes are reprinted in Appendix A to this brief.

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*Unless otherwise specified all references hereinafter are to pages of the Appendix.

[1] The complaint alleged that Respondents violated Section 1 of the Sherman Act, 15 U.S.C. 1 (Count I), Section 3 of the Clayton Act, 15 U.S.C. 14 (Count II), and Section 2 of the Robinson-Patman Act 15 U.S.C. 13 (Count III).

[2] The United States Court of Appeals for the Seventh Circuit reversed the District Court's dismissal of Count III and remanded that Count for trial. This Petition is limited to a review of Counts I and II.

[3] Two Judges voted to grant the Petition for Rehearing [Appendix to the Petition for Writ at C-1].

QUESTIONS PRESENTED

The questions presented are:

1. May a Federal Court without trial immunize a major national franchisor from treble-damage liability to its franchisees under Section 4 of the Clayton Act (15 U.S.C. 15) on the sole ground that the franchisees are *in pari delicto* with the franchisor as a result of having executed the franchisor's standard form franchise agreement which the franchisor offered them as the only basis on which it would do business, where the franchisor, through coercive threats of franchise termination, compelled its franchisees to comply with provisions in its franchise agreement which required franchises to.

(a) deal exclusively with the franchisor as a supplier of all goods offered for sale by the franchisees;

(b) purchase non-trademarked "tied products" from the franchisor as a condition of purchasing the franchisor's trademarked and nationally advertised "tying product"; and

(c) sell all products at prices fixed by the franchisor?

2. Does an ousted franchisee have a cause of action against his franchisor under Section 4 of the Clayton Act for damages resulting from termination of his franchise agreement by the franchisor because of the ousted franchisee's refusal to comply with the exclusive dealing provisions in the franchisor's standard form franchise agreement?

3. Does the franchise method of distribution of a major national franchisor which (1) enforces requirements in its standard form agreements that (a) franchisees deal exclusively with the franchisor, and (b) purchase tied products from the franchisor; and which (2) restricts the franchisees' right to establish the price at which they sell merchandise which they have purchased, constitute a violation of Section 1 of the Sherman Act and/or Section 3 of the Clayton Act?

4. Is proof of a conspiracy essential to state a cause of action under Section 1 of the Sherman Act, 15 U.S.C. 1, or

is proof of a written agreement in restraint of trade by itself, without proof of a conspiracy, sufficient to state such a cause of action?

STATEMENT OF THE CASE

A. The Pleadings.

This action [16-45] was brought under Section 4 of the Clayton Act, 15 U.S.C. 15, in the United States District Court for the Northern District of Illinois, Eastern Division by four[4] former franchisees of MIDAS, INC. (one of the Respondents herein). The complaint charged the defendants (Respondents herein) with having violated Section 1 of the Sherman Act, 15 U.S.C. 1 [17], and Section 3 of the Clayton Act,[5] 15 U.S.C. 14 [18] by requiring Petitioners (and other franchisees) through written franchise agreements [36-45] to (a) deal exclusively with Respondents [40], (b) buy tied products from the Respondents [40] and (c) sell at retail prices fixed by Respondents [42]. The agreements also prohibited sales for resale [178] or from locations other than those specified in such agreements [37]. Petitioners also charged that Respondents had restricted the nature and variety of the products[6] which they allowed Petitioners (and other franchisees) to purchase and sell [e.g. 31, 134, 136, 141, 177, 179, 191] and that Respondents had conspired among one another to unlawfully restrain trade and commerce among the several states [26].

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[4]For convenience the franchisees are referred to as Skarupa, Ross, Pierce and Wheeler. Either directly or through wholly-owned subsidiaries the "four" franchisees operated 15 separate muffler shops under 11 separate franchises [14-16].

[5]See footnote 1.

[6]Respondents would not sell Petitioners any products other than automotive exhaust system parts and would not allow Petitioners or other franchisees to sell other automobile parts such as brake parts, shock absorbers, windshields, etc. [e.g. 141, 177, 179, 191].

Respondents answered the Complaint admitting that they had entered into franchise agreements with Petitioners (and others) under one or more of several standard form versions of a License and Sales Agreement which they had promulgated. They denied that they had violated Section 1 of the Sherman Act, 15 U.S.C. 1, or Section 3 of the Clayton Act, 15 U.S.C. 1, or that they had entered into any conspiracy to restrain trade or commerce.

B. The Evidence.[7]

The relevant facts in the record may be summarized as follows:

(1) *The Franchise Agreements*

In 1955 International Parts, Inc. started a franchise program [67]. It offered preprinted franchise agreements with MIDAS, INC. (a wholly-owned subsidiary) to Petitioners and others. The agreement outlined the terms and conditions under which Respondents would permit franchisees to participate in the program which featured the sale of Respondents' "MIDAS Muffler," "free 15-minute service," and a "lifetime" muffler guarantee good at any one of a number of shops which Respondents franchised across the nation [68-69]. Respondents agreed to underwrite one hundred per cent of the product cost [42-43] for this guarantee.[8]

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[7] There was no trial. The record consists of depositions of the parties, material produced in response to Motions for Production, Answers to Interrogatories, the Complaint and the Answer.

[8] In 1959 Respondents reneged on their original promise to underwrite the complete cost of their guarantee on their Midas Muffler. To induce franchisees to accept their franchise agreement, Respondents offered a muffler guarantee good at any Midas franchisee in the nation. Respondents promised to reimburse franchisees 100% of their product cost for these replacements, i.e., to bear the full cost of their guarantee program except for labor (with respect to which franchisees were free to make a service charge). Respondents unilaterally reduced this

A typical preprinted franchise agreement contained the following provisions [36-45]:

I(a)

". . .Seller hereby grants to Buyer, . . . the exclusive right to handle and sell Seller's products . . . provided said products are purchased by the Buyer from the Seller at the following location: . . ."

* * *

II(c)

"Buyer covenants and agrees that he will not, during the continuance of this agreement, without seller's written consent, handle in said store any products other than those purchased from the seller, or render services except on such products. Buyer further covenants and agrees that he will devote all of his time to the operation of the shop covered by this franchise and that he will not engage in any other business or employment."

* * *

II(h)

"Upon the execution of this agreement, Buyer agrees to purchase an opening stock for said store amounting to not less than $_____ at cost to the Buyer, for which Buyer shall pay one-half in cash, the balance to be paid net tenth prox."

* * *

III(b)

"Buyer covenants and agrees that in selling said merchandise he will maintain the retail list selling price set by the respective automobile manufacturers for mufflers and exhaust parts, which list price will be published by seller."

* * *

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to a 50% obligation. Franchisees purchased replacements under Respondents' guarantee at 50% of cost [e.g. 129-130]. This charge equalled (approximately) Respondents' cost of production.

IV(a)

"(a) This agreement may be terminated at any time by either party upon giving the other thirty (30) days written notice of such intention prior to said termination date. . . ."

(2) *Reasons for Accepting the Agreement*

Petitioners (and others) accepted and executed Respondents' franchise agreements to acquire the opportunity to purchase and sell Respondents "MIDAS" Muffler [e.g. 138]. Respondents refused to sell this muffler to Petitioners (or others) until and unless they accepted and agreed to observe the terms of the franchise agreement [139].

Prior to accepting their first franchise agreements with MIDAS, INC., three[9] of the Petitioners herein were engaged for varying periods of time in the business of selling exhaust system parts, among other automobile parts. In the course of their business they had theretofore purchased some of their exhaust system supplies from International Parts, Inc., one of the Respondents herein [123]. They had also purchased from some of Respondents' competitors [123].

Petitioner Pierce accepted his first franchise agreement only after Respondents [124-125] suggested (1) that in the future they would refuse to sell him their International Brand Muffler (which carried substantially the same guarantee[10] as their MIDAS Muffler) and (2) that he would face stiff competition from their future franchisee if he refused. As a further "inducement" to Pierce (and also to Ross), Respondents told Pierce [129] that he could continue to purchase and sell other automobile parts (such as shock absorbers, in the case of Pierce, and automotive glass [56]

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[9]Pierce, Ross and Skarupa [e.g., 123-124].

[10]Respondents' "International" muffler also carried a "lifetime" guarantee. This guarantee was good only where purchased. Respondents would not sell their International muffler to "MIDAS" franchisees.

and springs [141], in the case of Ross) even though the terms of the franchise agreement prohibited such sideline business.

Respondents' national advertising [69] and their "lifetime" guarantee [68] coupled with Petitioners' own considerable local advertising[11] enabled Petitioner-Franchisees to earn profits from the sale of Respondents' MIDAS Muffler despite the fact that they were required to purchase exclusively from Respondents,[12] maintain prices fixed by Respondents[13] and were limited as to the locations from which, and the persons to whom, they could make sales.[14]

Soon after they had entered into their first franchises, Petitioners were made aware that their franchise agreement meant precisely what it said, i.e., that all franchisees were required to deal exclusively with Respondents and maintain prices fixed by Respondents.

Confronted with the prospect of losing the opportunity to purchase and sell the profitable MIDAS Muffler, petitioners submitted to the exclusive dealing and price-fixing requirements. Indeed, there was no alternative available to petitioners because to lose the franchise would mean to lose all substantial sums of money which they had invested

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[11] Ross invested $129,000 in advertising the Respondents' Muffler.

[12] Petitioners paid Respondents more for automotive exhaust system parts (other than mufflers) than they would have paid had they purchased these parts from Respondents' competitors [185-188, 189].

[13] Respondents would not allow Petitioners to price their exhaust system parts at competitive prices, and insisted on a "maintain-the-price" policy [197]. Some of Petitioners' competitors advertised and sold the "International" muffler which was (until 1959) physically identical to the "MIDAS" Muffler at prices which were substantially below the prices maintained by MIDAS [55].

[14] Respondents would not allow Petitioners to sell for resale, i.e., "wholesale" [179-180].

in advertising to promote the MIDAS Muffler [139]. Petitioners, therefore, observed the price-fixing requirements and purchased their tailpipes, exhaust pipes, clamps, and other supplies from Respondents even though the prices charged for these parts were substantially in excess of the prices which Respondents' competitors charged for these parts [185-188, 189].

(3) *Enforcement of the Agreement*

Through salesmen who inspected the franchisees' places of business, requirements of periodic financial reports, and analyses of purchase orders, Respondents maintained a close surveillance of the operations of these Petitioners (and other franchisees) in order to police compliance with the terms of their franchise agreements, particularly the exclusive dealing, tying, and price-fixing agreements. Respondents used subtle and sophisticated techniques ranging from covert threats of franchise termination [56, 133, 143] to full-blown termination in cases where actual threats proved ineffective, to compel Petitioners [201] and other franchisees [143, 177] to observe the exclusive dealing and price-fixing provisions in their franchise agreements.

The techniques utilized by Respondents to compel compliance are disclosed in the record.

Gordon Sherman (President of the Respondent MIDAS, INC.) described "basic MIDAS policy - exclusiveness" in one memorandum to his field counselors (nee salesmen) [July 1, 1957] as follows [176]:

> "THE MOST SACRED PRINCIPLE OF THE MIDAS PROGRAM . . ."
>
> "[This] also refers to any merchandise not carrying the MIDAS brand. . . . See to it that it is enforced and tell us where it isn't. Our policy in this matter is simply one of requiring that those people who are part of the program are part of it all the way."

Sherman reiterated "basic MIDAS policy" in subsequent memoranda [189] to his "field counselors" [August 13, 1958]:

"TEXAS TAIL PIPE CO OF HOUSTON

"I have attached to this bulletin a circular, a copy of which has been sent to all MIDAS shops.

"The Texas Tail Pipe Co. of Houston is a bit of a scavenger (there is nothing wrong with being a scavenger except that we do not like them) to the muffler industry. These people make a small assortment of popular numbers and distribute them at unjustifiably low prices.

"It is of course essential to participation in the MIDAS program that our dealers do not buy this merchandise."

Two months later [192] Sherman advised his "field counselors" [October 15, 1958]:

"BUYING FROM OUTSIDE SOURCES

"Several bulletins have gone forward to you describing the possible dereliction of some dealers in the direction of tail pipes and clamps of non-MIDAS origin. In a recent trip I had an opportunity to observe this felony and can now tell you what to look for.

* * *

". . . We regard this kind of promiscuous buying as a capital offense in MIDAS. It is inexcusable and it is hostile in the extreme to the program. You cannot work with a dealer if this kind of thing prevails."

Respondents' "field counselors" secured compliance with the terms of the franchise agreement.[15] Field counselor Gurnick wrote franchisees within the area of his responsibility [193] including Petitioner Ross, as follows [October 15, 1958]:

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[15] Petitioner Ross, for example, discontinued his "glass" business after receiving "advice" from Sherman's field counselor Gurnick that this was "against Midas policy" [56-57, 192].

"SHOP BUYING PRACTICES

"1) It is Midas policy that you buy your clamps exclusively from Midas.

"2) It is Midas policy that you buy your 'Hollywood Mufflers' from Midas.

"3) It is Midas policy that you buy your tailpipes from Midas.

"Your complete participation in the Midas Shop Buying Policy is requested.

"The next time I visit your shop, we can go into this matter more fully."[16]

Respondents initiated a project [195-196] of examining dealer orders to "isolate" those franchisees who were not "loyal." Sherman described this project as follows [March 25, 1959]:

"TAIL PIPE PURCHASES

"When a dealer signs a franchise with us he commits himself undeniably to certain basic practices in our program. Paramount among these is his consistent and exclusive purchase of our products. Our dealers have become so dedicated to our Muffler that I believe there is no question on this, but it is possible that some of them regard our tailpipes and our clamps as a kind of afterthought to which 'loyalty' does not apply. You have all been aware of certain

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[16] Later, Gurnick wrote Petitioner Ross [194] again in an "urgent memo," as follows [October 31, 1959]:

"Gordon Sherman advises you are not purchasing popular clamps from MIDAS.

"You are only purchasing a small quantity of special type clamps.

"The clamps are priced right, and even more important it is part of the policy to make such purchases from MIDAS.

"Please comply and cooperate in the future - if any ideas to the contrary please let me know. I have to report the results to Gordon Sherman."

tail pipe companies which manufacture short lines of easily produced numbers at discount prices.

* * *

"To help you isolate those dealers in need of attention along either of these lines I have indicated, we have been studying each and every MIDAS order as it is processed for shipment. We shall continue to do this indefinitely, it is this procedure that enables us to discover that for one reason or another some dealers are not buying enough pipes from us. We now have our first report on this project and are printing below the locations of those in question as follows: . . ."[17]

Petitioners testified to the techniques which Respondents utilized and reiterated their testimony in answers to Respondents' interrogatories. Petitioner Pierce, for example, testified [133]:

"Q. Well, my question at this point is directed not to shocks and springs and other products, but to exhaust systems only, such as Nu-Era or Texas Tailpipes, or what have you.

"A. Yes.

"Q. Would you explain these conversations for us?

"A. Well, Mr. Gordon Sherman came into my warehouses at one time and saw a shipment of Texas Tailpipes there and he was very unhappy about it.

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[17]Petitioner Pierce was among the franchisees isolated by this "project" [195].

Six months later [200] Pierce was the subject of a panel discussion at a sales meeting called by Sherman. At that meeting Sherman's salesman, Marc Vosc, discussed the subject assigned to him: "How much can we take from Joe Pierce?"

Two months later [201] Pierce's "nervous list of offenses" was the subject of a Sherman memo to his salesmen advising them that MIDAS, INC. had terminated Pierce's franchise.

"Q. What did he say?

"A. He said to me, he said, 'Joe,' he said, 'You know our franchise is just like a marriage, this is like cheating on your wife, it is grounds for divorce.' "

(4) *The Guarantee Program*

Toward the end of 1958, Respondents unilaterally announced that effective January 1, 1959, they would no longer honor guarantees on a full 100% cost basis [129]. The guarantee instead was reduced to 50% of Respondents' wholesale price. Petitioners (and other franchisees) were thereby forced to absorb 50% of the cost of all replacements they made even though any individual replacement might be made with respect to a muffler which the franchisee had not even installed in the first place. Thus franchisee Smith in Hoboken became liable for 50% of the product cost of replacing a muffler which franchisee Jones in Omaha had sold.[18]

(5) *Reappraisal of Program*

With the advent of the change in the guarantee program, all of the Petitioners reappraised their respective franchises.[19] Previously they had submitted to restrictive provisions of the franchise agreements in order to retain [e.g., 139] their right to sell the MIDAS Muffler and protect their substantial investments in local advertising of that product.[20] Petitioners were in an unusual position in that the more they invested in advertising Respondents' MIDAS Muffler, the more they were "laced into" the program. After Respondents changed their guarantee program in violation of their

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[18]Respondents thus transferred the entire cost of *their* "lifetime" guarantee to Petitioners. Fifty per cent of the wholesale cost was approximately equal to Respondents' cost of production.

[19]In 1959 alone the change in the guarantee cost Petitioners collectively in excess of $60,000.

[20]See footnote 11.

original representations (and the provisions of the original franchise agreements), there was nothing more for the Petitioners to protect. They were faced with a radically altered profit picture. Their anticipated profits from sales of the MIDAS Muffler would be all but destroyed by losses generated through the new guarantee replacement program. The burden of paying Respondents more [185-188] for automotive exhaust system parts (other than mufflers) than they would have paid Respondents' competitors, coupled with the respondents' rigid resale price maintenance [55, 197] policies, further reduced the attractiveness of the Respondents' franchise since these policies rendered franchisees less able to compete on a profitable basis.

Respondents cancelled Petitioner Pierce's franchise in late 1959 because he refused to adhere to the exclusive dealing provisions in his franchise agreement [60, 200, 201]. Other Petitioners then terminated their franchises to avoid the dual burdens, first, of paying the Respondents more for non-trademarked exhaust systems parts (other than mufflers) than they would have paid had they purchased such parts from Respondents' competitors and, second, the "new" cost of the guarantee program.

Petitioners filed this antitrust action in August 1960. At that time Respondents were directing the activities of more than 260 dealers operating over 350 MIDAS Muffler Shops in 42 states. Respondents' uniform preprinted franchises for all these shops required exclusive dealing as well as resale price maintenance and provided other unlawful restrictions as a condition of doing business with Respondents and purchasing Respondents' MIDAS Muffler. Through the use of their franchise agreements, Respondents between 1955 and 1960 trebled their business volume to more than $17,000,000 annually. At the time this action was filed they were the nation's fifth-largest distributor of autmotive exhaust system parts for the replacement market.[21]

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[21] *United States v. A.P. Parts Co.*, CCH Trade Cases 1964, ¶ 71,255. In the 1960 complaint filed by the Department of Justice in

C. The Motion for Summary Judgment

Prior to trial [61-63], Respondents moved for summary judgment contending that Petitioners were *in pari delicto* with Respondents and therefore had no standing to sue under Section 4 of the Clayton Act, 15 U.S.C. 15. Respondents also urged dismissal of Petitioners' Sherman Act claim on the ground that Petitioners had failed to show a conspiracy as alleged in their complaint.

D. The Ruling of the District Court

The District Court granted Respondents' Motion for Summary Judgment. It said [109]:

> "It is clear from the undisputed facts before us, that each plaintiff voluntarily entered into the franchise agreement at issue and accepted the benefits therefrom. They are under the holding in *Rayco* and *Crest,* in pari delicto [with Respondents], and therefore unable to reap the harvest of their own misdeeds. Each [Petitioner] recognized that the franchise conveyed to him the right to use the various MIDAS trade names, trade marks and service marks, and each profited from the use of same. They are not now entitled to the high profit of a treble damage suit when they voluntarily acceded to, fostered and profited from the very practice about which they now complain."

The District Court also said that the multiple-corporate Respondents constituted [112] "in fact a single corporation," and held that as such they could not be conspirators.

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that case, Respondents here were described as the fifth-largest distributor of exhaust system parts for the replacement market in the United States with approximately 11% of the market. See also *United States v. Maremont Automotive,* CCH Trade Cases 1960, ¶ 69,881.

E. The Opinion and Judgment of the Court of Appeals

With one Judge dissenting, the United States Court of Appeals for the Seventh Circuit affirmed dismissal of Petitioners' Section 1 Sherman Act and Section 3 Clayton Act counts. It quoted the District Court's opinion, reviewed the facts and reached the conclusion that "coercion" could not [214] "have been a factor herein" since Petitioners *voluntarily entered into* their first franchises. "It would be difficult," the Court of Appeals said, "to visualize a case more apporpriate for the application of the *pari delicto* doctrine. We hold that it was properly applied and given effect by the District Court."

The Court of Appeals distinguished this Court's decision in *Simpson v Union Oil Co. of California,* 377 U.S. 13, 84 S.Ct 1051 (1964), reversing 311 F.2d 764 (C.A. 9, 1963) on the ground [212] that this Court did not mention *in pari delicto* in its opinion. The Court of Appeals confined this Court's decision in *Simpson,* supra, to the precise facts of that case and noted that this Court in that opinion said [212] that it intimated no views on any issue other than the legality of Union Oil's resale price maintenance through a coercive type of consignment agreement.

The Court of Appeals also accepted the District Court's finding that the multiple-corporate Respondents were a single business entity through which a family business was operated and concluded that Petitioners had failed to sustain their conspiracy charge.

Circuit Judge Walter J. Cummings, Jr. dissented [224]. In his opinion he called attention [224] to the fact that *Simpson v. Union Oil Co.,* supra, had never before been cited to the Seventh Circuit. He said that an examination of the briefs filed in *Simpson* convinced him that the Supreme Court would not accept the *in pari delicto* defense in this case [224]:

> ". . . As with these plaintiffs, Simpson had the freedom of choice 'to accept or reject the tendered lease

and consignment contract. The record shows that he went into this deal with his eyes open and knew all the facts.' He 'deliberately and knowingly enter[ed] into [the] contractual obligations' (311 F.2d 764, 768, 769). In *Simpson,* the Ninth Circuit used the *in pari delicto* theory to deny him any recovery. That point was fully briefed in the Supreme Court, which reversed, permitting Simpson to prevail. Therefore, I am forced to conclude that the Supreme Court rejected the *in pari delicto* defense. . . ."

Circuit Judge Cummings also said [226] that "this record" shows that MIDAS and International held themselves out as separate and "divorced." This fact, he said, "does not permit [Respondents] to claim that as a single business entity they were unable to conspire." Moreover, he said a conspiracy is not needed to support a Sherman Act claim.

Petitioners moved for a rehearing en banc. The Circuit denied this motion although Circuit Judges Swygert and Cummings voted to grant the Petition for Rehearing En Banc.

F. The Petition for Certiorari.

The Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit was filed in this Court on October 17, 1967. By order dated January 15, 1968, this Court granted review.

SUMMARY OF ARGUMENT

The District Court applied the *in pari delicto* doctrine to legitimatize the franchise system of distribution of a major national franchisor who forced its franchisees to purchase "tied products," required its franchisees to deal exclusively with the franchisor, and fixed the retail prices at which franchisees sold the franchisors' products. The Court below affirmed. Its decision in effect authorizes a private exemption for franchisors from the provisions of the antitrust laws. It reasoned that once a franchisee voluntarily *enters into* a franchise agreement which spells out competitive restrictions the franchisee cannot thereafter complain even though the

competitive restrictions transgress the boundaries defined by both the Sherman and Clayton Acts.

This view of Section 4 of the Clayton Act cannot stand. The *in pari delicto* doctrine is inapplicable to treble damage actions brought under that Section. The Court's decision virtually destroys Section 4 as a weapon for enforcement of the antitrust laws. It authorizes franchisors to regiment thousands of franchisees in methods of merchandise distribution which clearly conflict with antitrust policy.

Under the theory of the Court below franchisees cannot complain even though their franchisor compels adherence through threats of franchise termination. This view cannot stand either. The Respondents' franchise agreement as used by the Respondents in this case constitutes a coercive device which is unlawful within the meaning of this Court's decision in *Simpson v. Union Oil of California*, 377 U.S. 13, 84 S.Ct. 1051 (1964).

The court below also affirmed summary judgment on the ground that Petitioners had failed to show a conspiracy within the meaning of Section 1 of the Sherman Act and implied that a conspiracy was essential to state a cause of action under that Section. This decision conflicts with the authorities which hold that proof of a conspiracy is not essential to state a claim under Section 1 of the Sherman Act. Moreover, the facts here show "an agreement" in restraint of trade condemned by the Sherman Act as well as a conspiracy.

The District Court's decision in granting summary judgment denied Petitioners a decision on the merits of their claim despite the fact that issues of fact existed. The existence of genuine issues of material fact precluded summary judgment.

ARGUMENT

I

THE RESTRAINTS WHICH THE RESPONDENTS EFFECTED BY THEIR FRANCHISE AGREEMENTS ARE PRECISELY THE TYPES OF RESTRAINTS WHICH THE SHERMAN AND CLAYTON ACTS WERE DESIGNED TO PREVENT.

The Respondents' use of the franchise agreements to achieve exclusive dealing, force the sale of tied products, fix retail prices, and restrict the areas within which, as well as the persons to whom, purchasers could sell Respondents' products, represents a classic example of conduct which the Sherman (15 U.S.C. 1) and Clayton (15 U.S.C. 14) Acts were intended to reach. *Standard Oil of California v. United States,* 337 U.S. 293, 69 S.Ct. 1051 (1959) [exclusive dealing contracts]; *Standard Fashion v. Magrane-Houston Co.,* 258 U.S. 346, 42 S.Ct. 360 (1922) [exclusive dealing contracts]; *Federal Trade Commission v. Brown Shoe Co.,* 384 U.S. 808, 86 S.Ct. 1501 (1966) [exclusive dealing contracts]; *Northern Pacific Railway Company v. United States,* 356 U.S. 1, 78 S.Ct. 514 (1958) [tying agreements]; *United States v. Loew's,* 371 U.S. 38, 83 S.Ct. 97 (1962) [tying agreements]; *Anchor Serum v. Federal Trade Commission,* 217 F.2d 867 (C.A. 7, 1954) [exclusive dealing agreements]; *Osborn v. Sinclair Refining Co.,* 286 F.2d 832 (C.A. 4, 1961) [exclusive dealing agreements]; *United States v. Parke, Davis & Co.,* 362 U.S. 29, 80 S.Ct. 503 (1960) [price-fixing]; *Simpson v. Union Oil Co. of California,* 377 U.S. 13, 84 S.Ct. 1051 (1964) [price fixing]; *United States v. Arnold, Schwinn & Co.,* __ U.S. __, 87 S.Ct. 1856 (1967) [resale restrictions]; *United States v. General Motors,* 384 U.S. 127, 86 S.Ct. 1321 (1966) [resale and territorial restrictions]; *United States v. Sealy, Inc.,* __ U.S. __, 87 S.Ct. 1847 (1967) [territorial restrictions].

A. Unlawful Exclusive Dealing (Requirements Contracts) and Tying Arrangements.

The record in this case clearly shows the use of unlawful exclusive dealing and tying arrangements. One need merely compare the exclusive dealing language in one of Respondents' typical franchise agreements with the language of Section 3 of the Clayton Act (15 U.S.C. 14) to appreciate the nature of the restraint which the Respondents effected through the use of their franchise agreement:

II(c) of Typical Franchise Agreement [40]	Section 3 of the Clayton Act (15 U.S.C. 14)
"Buyer covenants and agrees that he will not . . . handle . . . any products other than those purchased from the seller. . . ."	"It shall be unlawful for any person . . . to contract for the sale of goods . . . on the condition . . . that the purchaser . . . shall not . . . deal in the goods . . . of a competitor. . . ."

Since the Respondents refused to sell their MIDAS Muffler to anyone unless he first executed a preprinted franchise agreement containing the foregoing provisions, Respondents effectively tied the sale of unlabeled, non-trademarked exhaust system parts (principally tailpipes, exhaust pipes and clamps) to the sale of their MIDAS Muffler. The tied products were integral parts of an exhaust system, and therefore essential to the franchisees' business.

Absent paragraph II(c) of the typical franchise agreement, franchisees, including Petitioners, would have been able to purchase the non-trademarked exhaust system parts such as tailpipes, exhaust pipes, and clamps from competitors of Respondents at significantly lower prices [185-188, 189, 195]. Through the franchise device Respondents were able to force their franchisees to deal exclusively with them and, at the same time, foreclose competitors [154, 158] from a substantial share of commerce in exhaust system parts. Moreover, since Respondents' prices for exhaust system parts were greater than the prices of their competitors, the arrangement had no redeeming quality. *United States v. Loew's,*

supra; *Standard Oil Company of California v. United States*, supra; *Northern Pacific Railway Company v. United States*, supra.

Respondents' exclusive dealing requirements and tying agreements are precisely the type of restraint which Section 1 of the Sherman Act and Section 3 of the Clayton Act were intended to stop. *Standard Oil Co. of California v. United States*, supra; *Standard Fashion v. Magrane-Houston Co.*, supra; *Federal Trade Commission v. Brown Shoe Co.*, supra; *Northern Pacific Railway Company v. United States*, supra; *United States v. Loew's*, supra; *Anchor Serum v. Federal Trade Commission*, supra; *Osborn v. Sinclair Refining Co.*, supra.

B. Unlawful Price-Fixing.

Through subparagraph (b) of Article III [42] of their typical franchise agreement Respondents effected an unlawful price-fixing scheme by requiring franchisees to ". . . maintain the retail list selling price . . . for mufflers and exhaust parts . . . published by seller. . . ." This system of price-fixing agreements which Respondents utilized in interstate commerce, for the purpose of fixing the amount consumers would pay, eliminated competition and was illegal per se. *United States v. Parke, Davis & Company*, supra; *White Motor Company v. United States*, 372 U.S. 253, 83 S.Ct. 696 (1963).

The record shows that this provision applied to unlabeled non-trademarked exhaust system parts [162-163] as well as to Respondents' MIDAS Muffler. Respondents cannot claim a fair trade exemption. They cannot even assert that they did not require their franchisees to sell at prices which they fixed since the record contains numerous references by Respondents [179, 181, 197] to their "maintain-the-price merchandising" policy which forbade the practice of discounting or "wholesaling."

Where express agreements are employed to compel maintenance of retail prices for the purpose of regimenting a

marketing system and coercive means are used to enforce price obedience, an unlawful price-fixing plan exists. *United States v. Parke, Davis & Company,* supra. Respondents' use of franchise agreements in the instant case to compel price conformity parallels the use of consignment agreements for that purpose, which this Court condemned in *Simpson v. Union Oil of California,* supra. There, Mr. Justice Douglas speaking for the Court in this case said:

> "We made clear in United States v. Parke, Davis & Co., 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505, that a supplier may not use coercion on its retail outlets to achieve resale price maintenance. We reiterate that view, adding that it matters not what the coercive device is. United States v. Colgate, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992, as explained in Parke, Davis, 362 U.S. at 37, 80 S.Ct. 503, 4 L.Ed. 2d 505, was a case where there was assumed to be no agreement to maintain retail prices. Here we have such an agreement; it is used coercively, and, it promises to be equally if not more effective in maintaining gasoline prices than were the Parke, Davis techniques in fixing monopoly prices on drugs." (at 17)

C. Unlawful Territorial and Other Restrictions

The unlawful territorial and other restrictions placed upon franchisees by the Respondents as part of the franchise agreement, fall well within the classes of restraints this Court recently condemned in *United States v. Arnold, Schwinn & Company,* supra. See also *United States v. Sealy, Inc.,* supra and *United States v. General Motors,* supra. Respondents required franchisees to "purchase" and pay for a minimum opening stock at the time they granted a franchise. Under the agreement, franchisees were given the right (1) to purchase Respondents' products for resale [37] from a location or locations specifically designated in the franchise agreement (2) at prices fixed [42] by Respondents. Franchisees were thus restricted with reference to the areas within which they

could sell merchandise which they had in fact *purchased* from Respondents. Moreover, in view of the price restrictions and prohibitions against wholesaling, franchisees were also limited with reference to the persons to whom they could sell merchandise which they had *purchased* from the Respondents.

In *Arnold, Schwinn & Company*, supra, this Court held that a manufacturer violated Section 1 of the Sherman Act when it made sales to retailers on *any* condition, agreement, or understanding limiting the retailers' freedom as to where and to whom retailers would resell products. At __ U.S. __ U.S. __, 87 S.Ct. 1864, the Court said:

> ". . . restraints as to territory or customers, vertical or horizontal, are unlawful if they are 'ancillary to price-fixing' (White Motor Co. v. United States, supra, 372 U.S. at 260, 83 S.Ct. at 700) or if the price fixing is 'an integral part of the whole distribution system' (Bausch & Lomb, supra; 321 U.S. at 720, 64 S.Ct. at 812). In those situations, it is needless to inquire further into competitive effect because it is established doctrine that, unless permitted by statute, the fixing of prices at which others may sell is anticompetitive, and the unlawfulness of the price-fixing infects the distribution restrictions."

Respondents' own memoranda demonstrate the nature and extent of these restrictions. The record, for example, shows that Gordon Sherman (President of the Respondent MIDAS) instructed his field counselor about Respondents' policies [178] against "wholesaling" and "sub-agenc[ies]" and ordered them to give [their] "initial attentions" to MIDAS supplier[s] and sub-agent[s].

D. Impact of Restraints

The combination of restraints which the Respondents imposed upon franchisees as consideration for extending them the opportunity to sell Respondents' MIDAS Muffler go far beyond the activities which the Sherman and Clayton Acts permit. The impact of these restraints can be best under-

stood if examined in the context of the economic framework within which they occurred. The salient facts are that Respondents were the fifth-largest distributor of automotive exhaust system parts for the replacement market in the United States. As of the date of the complaint, 1960, their wholesale sales exceeded 17 million dollars annually. Sales were made primarily through franchise outlets whose activities were restricted in exactly the same fashion as these Petitioners. It is noteworthy that Respondents' largest competitor, Goerlich, Inc., engaged in precisely the same type of practices as these Respondents. Its activities were the subject of an antitrust complaint by the Department of Justice. Following the complaint this competitor entered into a consent decree which prohibited the activities which are identical to the activities which are the subject of the complaint in this proceeding.[22]

By contrast with Respondents, Petitioners here were small, independent, starry-eyed venturers eager to build local businesses. According to Respondents, one of the Petitioners (Skarupa) was no more [76] than a $7,700-a-year "government clerk," while another (Wheeler) was [99] a $6,000-a-year poolroom operator. The resources which the individual Petitioners were able to muster at the time they succumbed to the romantic lure of Respondents' franchise program can hardly be compared with the resources available to Respondents, whose business exceeded several million dollars annually. One could hardly conclude that Petitioners or any other franchisees bargained as equals the terms

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[22]See *United States v. A.P. Parts Corporation and Goerlich's, Inc.*, CCH Trade Cases 1964, ¶ 71,255. The Consent Order there set forth reads in pertinent part as follows:

> "The defendants are each enjoined and restrained from selling or contracting to sell any automotive exhaust system parts to any distributor or jobber upon the condition, agreement, or understanding that the purchaser shall not deal in automotive exhaust system parts manufactured by any person other than the defendants."

of the Respondents' franchise agreement. Indeed, the whole theory of franchising rests on the concept that the franchisor and the franchisee are not equals.[23] Franchises are presumably designed to enable the small venturer to enter the business field with the help and assistance of the franchisor, who is able to lend business acumen and financial assistance.

One other economic fact is significant to the proceeding: many suppliers of exhaust system parts who were competing with the Respondents were [189] substantially smaller than the Respondents. Through the use of exclusive dealing agreements, Respondents were able to prevent these smaller suppliers from gaining a foothold in this line of commerce, despite the fact that these suppliers regularly offered exhaust system parts to Petitioners and other franchisees at prices substantially below the Respondents' prices [154, 189].[24]

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[23] "The Franchise System of Distribution," Edwin H. Lewis & Robert S. Hancock (1963).

[24] The fact that Petitioners were forced to pay Respondents more for automotive exhaust system parts (other than mufflers) than they would have had to pay if they had purchased such from Respondents' competitors demonstrates the damages incurred by Petitioners. *Lessig v. Tidewater Oil Co.*, supra; *Osborn v. Sinclair Refining Co.*, supra.

II

THE DOCTRINE OF "IN PARI DELICTO" DOES NOT BAR FRANCHISEES FROM BRINGING AN ACTION FOR TREBLE DAMAGES UNDER THE ANTITRUST LAWS.

A. Violations of Section 1 of the Sherman Act.

The doctrine of *in pari delicto* does not prevent Petitioner-franchisees from bringing a treble-damage action against Respondent-franchisors under Section 1 of the Sherman Act, 15 U.S.C. 1. *Simpson v. Union Oil Company of California,* supra.

In *Simpson,* supra, Union Oil argued that the doctrine of *in pari delicto* barred an action under Section 4 of the Clayton Act (15 U.S.C. 15) alleging violations of the Sherman Act. Union Oil contended that since the plaintiff and defendant were parties to the same illegal agreement upon which the suit was grounded Simpson did not have standing to sue. The Ninth Circuit accepted Union Oil's argument and affirmed the District Court's judgment granting defendant's motion for summary judgment. The Ninth Circuit assumed [but did not decide] that Union Oil's consignment agreement was violative of the Sherman Act, and held that Simpson was precluded from recovering damages because Simpson knew that by obtaining a lease from Union Oil he would also be required to sign a restrictive consignment agreement. Since he had freedom of choice to accept or reject the tendered lease and consignment agreement, Simpson entered into these arrangements with his eyes open and with full knowledge of the facts. The Ninth Circuit reasoned that any damage sustained by Simpson was the result of Simpson's own acts. This Court reversed, stating (at p. 16):

> "We disagree with the Court of Appeals that there is no actionable wrong or damage if a Sherman Act violation is assumed. If the 'consignment' agreement achieves resale price maintenance in violation of the Sherman Act, it and the lease are being used to injure interstate commerce by depriving independent dealers of the exercise of free judgment whether to become consignees at all, or remain consignees, and,

in any event, to sell at competitive prices. *The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the antitrust laws.*" [Emphasis supplied.]

In the instant case the Court below sought to limit *Simpson* to its specific facts and to distinguish the facts therein from the facts in the case at bar. The Court below also relied upon the fact that there was no express mention of *in pari delicto* in the Court's opinion in *Simpson*. *Simpson*, however, cannot be read, as the majority of the Court below apparently did, without reference to the opinion which it reversed [311 F.2d 764 (C.A. 9, 1963)]. As pointed out above, Simpson's antitrust claim was denied in the Ninth Circuit for precisely the same reasons which the majority of the Court below used to deny the claims of these Petitioners. *In pari delicto* was fully argued in briefs by both Simpson and Union Oil in this Court.

We submit that in *Simpson*, supra, this Court held not only that Union Oil's consignment agreement was unlawful, but also that antitrust plaintiffs are not barred from bringing actions for violation of the antitrust laws under Section 4 of the Clayton Act simply because they have previously accepted agreements binding them to follow price schedules fixed by their suppliers, where their suppliers require such agreement as a condition of doing business.

The facts in the instant case are nearly parallel to *Simpson*.[25]

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[25] The Court below said that *Simpson* and the case at bar were "a far cry" from one another. [214]

Simpson v. Union Oil Co.	Case Before the Court
1. Simpson sued Union Oil under Section 4 of the Clayton Act charging that defendants had violated Section 1 of the Sherman Act.	1. Petitioners sued under Section 4 of the Clayton Act charging that Respondents had violated Section 1 of the Sherman Act.[26]
2. Simpson complained that Union Oil required him to sell at prices which Union fixed.	2. Petitioners complained that Respondents required them to sell merchandise which they had purchased from Respondents at prices which Respondents fixed.[27]
3. Union Oil used its service station leases as a tying device. It tied its leases to its gasoline consignment agreements in order to promote its price-fixing policies.	3. Respondents used their franchise agreement as well as the MIDAS Muffler as tying devices. These devices were used to promote Respondents' price-fixing policies and to compel the purchase of tied products such as non-trademarked tailpipes, exhaust pipes, muffler clamps, hangers and Hollywood Mufflers.

[26] In addition, Petitioners alleged violations of Section 2 and 3 of the Clayton Act (15 U.S.C. 13, 14).

[27] Petitioners also alleged that they had been required to deal exclusively with Respondents' purchase tied products from the Respondents, and that Respondents had discriminated with respect to the terms and discounts on which they sold automotive exhaust system parts to Petitioners and other of their customers.

4. Simpson accepted Union Oil's consignment agreement and lease with full knowledge that he was required to sell at prices fixed by Union Oil. This was the only basis on which Union Oil would do business with Simpson.

4. Petitioners accepted the unlawful restrictions in Respondents' franchise as the only basis on which Respondents would do business with Petitioners. One Petitioner, Pierce, accepted Respondents' franchise only after he was threatened with enfranchisement of a competitor as a Midas dealer, and with the sale of the International Muffler to his competitors.[28]

5. Union Oil threatened to discontinue business relations with Simpson and refused to renew Simpson's lease because Simpson refused to adhere to defendants' price-fixing policies.

5. Respondents threatened to terminate Petitioners' franchises if they refused to adhere to Respondents' price-fixing, exclusive dealing and tying policies. Respondents terminated the franchise of the Petitioner Pierce when he refused to deal exclusively with the Respondents and buy their tied product.[29]

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[28] At the time Respondents offered him a Midas franchise, Petitioner Pierce was already buying Respondents' "International" brand muffler. Respondents suggested they would start selling the "International" muffler to someone else if he refused to accept the franchise agreement [124-125].

Petitioner Ross was selling automobile glass at the time he accepted Respondents' franchise. Respondents promised that he could continue his profitable business of selling glass [56].

[29] In 1958 Respondents also changed the rules on Petitioner Ross and threatened to terminate his franchise if he continued selling glass [56-57, 191]. Ross, who invested thousands of dollars ($129,000) in advertising Respondents' muffler discontinued the sale of glass to protect his investment in Respondents' muffler [139]. Still later, after Respondents changed the terms of their guarantee and terminated Pierce, Ross terminated his franchise [168].

Circuit Judge Walter E. Cummings pointed out some of the parallels between the case at bar and *Simpson* in his dissenting opinion [224]:

> "A close study of the *Simpson* case, including the briefs filed therein, convinces me that the Supreme Court would not accept the *in pari delicto* defense here. As with these plaintiffs, Simpson had freedom of choice 'to accept or reject the tendered lease and consignment contract. The record shows that he went into this deal with his eyes open and knew all the facts.' He 'deliberately and knowingly enter[ed] into [the] contractual obligations' (311 F.2d 764, 768, 769). In *Simpson*, the Ninth Circuit used the *in pari delicto* theory to deny him any recovery. That point was fully briefed in the Supreme Court which reversed, permitting Simpson to prevail. Therefore, I am forced to conclude that the Supreme Court rejected the *in pari delicto* defense. Judge McLean came to the same conclusion in Lyons v. Westinghouse Electric Corporation, 235 F.Supp. 526, 537 (S.D. N.Y. 1964), stating:
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> > "'It may be noted that under Simpson v. Union Oil Co., supra, the fact that plaintiffs voluntarily entered into an illegal contract does not in itself bar their recovery. The contract, if illegal, is still an actionable wrong.'
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> "In *Simpson*, even Mr. Justice Stewart's dissent agreed that the *in pari delicto* reasoning of the Ninth Circuit was 'untenable' (377 U.S. at p. 25). As in Simpson, these defendants had the coercive power to terminate plaintiffs' franchises if plaintiffs did not adhere to the resale price maintenance and exclusive dealing provisions. These plaintiffs wished to buy various parts (tailpipes, clamps, etc.) from competitors of Midas, who were selling at lower prices than Midas. If they had been permitted to purchase at these lower prices, they would have been able to lower their price, as did Simpson."

Sound administration of the antitrust laws demands that the views expressed by Circuit Judge Cummings in his dis-

senting opinion prevail. In effect the majority opinion permits Respondents to use a franchise agreement which they have drafted and for which they are solely responsible to insulate themselves from liability for their subsequent acts requiring Petitioners to adhere to the exclusive dealing, tying and price-fixing provisions in those franchises. Under the majority theory, Respondents' franchise document constitutes a privately created exemption from the provisions of Section 4 of the Clayton Act through which franchisors, with complete immunity from franchisee suits under the provisions of Section 4, may require exclusive dealing, fix prices, and effect other unlawful restraints without regard to the public policy legislatively defined in the Sherman and Clayton Acts. The decision of the Court below not only allows Respondents to deny their competitors free access to a market for their products, but goes far beyond this and permits Respondents also to interfere with a purchaser's right to sell to whom he pleases, at prices of his own choosing. But see *United States v. Arnold, Schwinn, & Co.* __ U.S. __, 87 S.Ct. 1856 (1967). Section 4 cannot be read to allow this result.

The Court below ignored the fact that Respondents had no right to impose exclusive dealing and price-fixing requirements as part of their franchise agreements, *Goodyear Tire and Rubber Co. v. F.T.C.*, 331 F.2d 394, 401 (C.A. 7, 1964), affirmed 381 U.S. 357, 85 S.Ct. 1498 (1965); the fact that the Respondents' franchise agreements were illegal even if they were not coercively induced, *Sun Oil Company v. F.T.C.*, 350 F.2d 624, 636 (C.A. 7, 1965), cert. denied 382 U.S. 982, 86 S.Ct. 559 (1966); as well as the fact that Petitioners accepted the Respondents' franchise agreement as the only basis on which Respondents would do business with them and not in any effort to establish, assist, or cooperate with the Respondents in violating the antitrust laws. See, e.g., *Bales v. Kansas City Star*, 336 F.2d 439 (C.A. 8, 1964); *Red Rock Bottlers v. Red Rock Cola Company*, CCH Trade Cases 1953 ¶ 67,375 (D. Ga., 1952).

The Court below also failed to attach any legal significance to the fact that Respondents used threats of franchise termination under the 30-day cancellation provisions in their franchise agreement (and actual termination where threats proved ineffective)[30] to compel Petitioners and other franchisees to observe the unlawful provisions in their franchise agreement. See *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (C.A. 4, 1960); *Osborn v. Sinclair Refining Co.*, 324 F.2d 566 (C.A. 4, 1963); and *Goodyear Tire and Rubber Company v. F.T.C.*, supra, at 401. The Court below even ignored the record which showed that Respondents [195-196] had "studied" each and every MIDAS order as it was processed for shipment to "isolate" those dealers who were not buying tailpipes from them, as well as the fact that Respondents distributed the results of this "study" to their field counselors with instructions to "enforce" the exclusive dealing provisions in the franchise agreement. The record shows that Respondents' field counselors carried out their instructions. One such salesman wrote [193] to Petitioner Ross that it was "MIDAS Policy" that Ross buy "exclusively from MIDAS." He told Ross that he would "get into the matter more fully" on his next visit. The same salesman later complained to Ross [194] that Gordon Sherman [President of MIDAS] advised him that Ross was "not purchasing clamps from MIDAS" stating that he had to "report" to Sherman on this matter. In the face of this overwhelming evidence of coercion the Court below held [214] that "coercion" could not be a factor herein since Petitioners had voluntarily "entered into" the franchise agreements in the first instance. In effect the Court below held that once a franchisee *enters into* an unlawful agreement "voluntarily," his franchisor may thereafter enforce the terms of that agreement without regard to the provisions of the antitrust laws. This construction of the antitrust laws is absurd.

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[30] The franchise of Petitioner Pierce was terminated in precisely this manner [133, 199, 200, 201].

The majority opinion of the Court below does not even accord Petitioners standing equal to the standing which this Court granted the plaintiff in *Moore v. Mead's Fine Bread*, 340 U.S. 944, 71 S.Ct. 528 (1951), vacating 184 F.2d 338 (C.A. 10, 1950). There was much more reason to apply the *in pari delicto* defense in *Moore* than there is to apply it here. There, however, this Court did not permit the defense, although defendant's violations were an attempt to protect itself against unlawful, predatory practices which plaintiff had initiated. Plaintiff was the direct and specific cause of his own damage in *Moore*. Nevertheless, in plaintiff's action for treble-damages under Section 4, the *in pari delicto* defense, though specifically asserted, was rejected.

The theory expounded by the majority opinion below virtually destroys Section 4 as a weapon for enforcement of Section 1 of the Sherman Act and Section 3 of the Clayton Act. Under that theory, franchisees are precluded from asserting their right to treble-damages by entering into a franchise agreement enforced in violation of those statutes. Such result was never intended.

In Section 4 Congress has provided injured parties with tools to compel compliance with the antitrust laws and achieve economic redress. Indeed, private suits under Section 4 play and were intended to play a vital role in promoting competition. *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329, 75 S.Ct. 865, 869 (1955); see, e.g., *J. I. Case Co. v. Borak*, 377 U.S. 426, 432, 84 S.Ct. 1555, 1560 (1964). Such private enforcement is essential to the effective administration of the antitrust laws since neither the Department of Justice nor the Federal Trade Commission has the financial or administrative resources to sift out all violations and act upon them. Moreover, penalties which those agencies are permitted to seek may be far less effective since treble damages arising out of Sherman Act and Clayton Act violations can greatly exceed the criminal and civil penalties imposed in an action brought by the Government. The threat of a treble-damage action is a potent

deterrent to violations of the antitrust laws; it is in fact the most effective deterrent against such violations. See "Unclean Hands, The Effect of Antitrust Violations on Antitrust Actions," 113 Pa. L.Rev. 1071, 1080 (1965).

In *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 751-752, 67 S.Ct. 1015 (1947), this Court explained the purpose of Section 4 as follows:

> ". . . This stimulates one set of private interest to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement, which relieves the Government of cost of enforcement. . . . It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and reasonable attorneys' fees."

In light of this Congressional policy, it is clear that the majority opinion below produces paradoxical results. It denies benefits of the antitrust laws to one of the very classes of persons that those laws were designed to protect, negates effective enforcement of the antitrust laws by the very persons who have the closest and perhaps the only personal knowledge of antitrust violations, and at the same time allows defendants to perpetuate practices which the Clayton and Sherman Acts were designed to stop. If Section 4 is to achieve its legislative purpose of amplifying enforcement of the antitrust laws, Federal Courts should not be permitted to overrride its strong public policy by developing a judicial "hostility" to treble-damage claims through the application of irrelevant common-law principles. Circuit Judge Cummings in his dissent below recognized the anomalous result. He stated [225]:

> "The public policy justifying the denial of an *in pari delicto* defense in a case of this sort was stated as

follows with reference to the unclean hands defense raised in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 214:

> "'If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the unlawful combination by respondents nor immunize them against liability to those injured.'"

The situation in the instant case is within this Court's holding in *Simpson v. Union Oil Co. of California,* supra; the doctrine of *in pari delicto* is inapplicable. See also *Koufakis v. Carvel* (67-C-1951, E.D.N.Y., January 5, 1968) and *Gaines v. Carrollton Tobacco Board of Trade, Inc.,* 386 F.2d 757 (C.A. 6, 1967).

B. Violations of Section 3 of the Clayton Act.

The doctrine of *in pari delicto* has no application to actions brought under Section 4 of the Clayton Act for violations of Section 3 of the Clayton Act. Section 3 makes it unlawful:

> ". . . for any person engaged in commerce, in the course of such commerce, to . . . make a sale . . . of supplies, . . . for . . . resale . . ., or fix a price charged therefor, . . . on the condition, agreement, or understanding that the . . . purchaser thereof shall not use or deal in the . . . supplies, . . . of a competitor or competitors of the . . . seller, where the effect of such . . . sale . . . or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

Petitioners are among the class of persons whom this statute was designed to protect. *Bales v. Kansas City Star,* supra. The provisions of this section are directed specifically to "sales" on the "condition, agreement or under-

standing . . ." that the "purchaser" shall not deal in the goods of competitors. It was designed to prevent sellers from imposing their will on purchasers. This statute does not prevent nor does it even attempt to condemn "purchases" on a "condition, agreement, or understanding . . ." In view of this it is rather difficult to understand how Petitioners are *in pari delicto*. They surely have done nothing to violate the provisions of this section of the Clayton Act.

The assertion that Petitioners are *in pari delicto* under Section 3 is rather anomalous. In order to sustain an action under this Section they must show a sale on the "condition, agreement, or understanding . . ." Without a "sale" on the "condition, agreement, or understanding . . ." there can be no violation of Section 3. See *McElhenney v. Western Auto Supply Co.*, 269 F.2d 332 (C.A. 4, 1959), and *Amplex v. Outboard Marine Corp.*, 380 F.2d 112 (C.A. 4, 1967). Having shown a "sale" on the "condition . . ." to satisfy the test of this section, i.e., a sale pursuant to the terms of the Respondents' franchise agreement on which Respondents' whole business concept is predicated, Petitioners are thrust onto the horns of a false dilemma: the consent essential to the very agreement and "sale" on the "condition . . ." which they must show to state a cause of action constitutes a bar to their recovery.

Neither *in pari delicto* nor consent has a place in private judicial enforcement of Section 3 of the Clayton Act. Section 3 is an anticonsent statute. See "In Pari Delicto And Consent As Defenses in Private Antitrust Suits," 78 Harv. L.Rev. 1241 (1965); "Limiting the Unclean Hands and In Pari Delicto Defenses in Antitrust Suits - An Additional Justification," 54 N.W. Law Rev. 456 (1959).[31]

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[31] ". . . several other district courts have displayed an apparent disregard to the recent Supreme Court and circuit court cases which limited the defense. To the extent that this misunderstanding is accountable for the judicial hesitancy and apparent inconsistency in application, it is earnestly submitted that the courts are doing no injustice to the traditional use of the clean hands requirement by relaxing it

This Court has said that a claim under Section 4 "need only be tested under the Sherman Act's prohibition on unreasonable restraints of trade, . . . and meet the requirement that petitioner has thereby suffered injury." *Radovich v. National Football League,* 352 U.S. 445, 453, 77 S.Ct. 390 (1957); *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207; 79 S.Ct. 705 (1959); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.,* 364 U.S. 656, 81 S.Ct. 365 (1961); "Standing to Sue for Treble Damages under Section 4 of the Clayton Act," 64 Columbia L.Rev. 570, 587 (1964). To the same general effect see *Mandeville Island Farms v. American Crystal Sugar Co.,*[32] 334 U.S. 219, 68 S.Ct. 996 (1948):

> ". . . It is enough that these petitioners have suffered the injuries for which the statutory remedy is afforded. For the test of legality and immunity . . . in view of the statute's policy, . . . [is] whether the statute's policy has been violated in a manner to produce the general consequences it forbids . . . for particular individuals essential to the recovery of treble damages." (at 243)

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in appropriate circumstances. On the contrary, proper application demands a weighing of public policy behind enforcing free competition on the one hand, with the public policy of forbearing aid to a plaintiff guilty of unconscionable conduct on the other. However, where Congress has codified the former public policy into the antitrust laws and has reannounced this policy several times, little evidentiary examination or measurement of comparative degrees of illegality is necessary; the call of public policy here is so loud and clear that it must be given decisive weight." [54 N.W.U. Law Rev. 464, 1959]

[32]In *Mandeville,* supra, the District Court held that Mandeville could not recover because it had failed to satisfy the commerce test and because it had signed a contract forming part of the illegal arrangement of which it had complained. The Court of Appeals affirmed on the commerce issue alone. This Court reversed, thereby rejecting the *in pari delicto* defense that defendant had specifically pleaded.

III

PETITIONERS' CAUSE OF ACTION BASED UPON SECTION 1 OF THE SHERMAN ACT WAS DISMISSED IN ERROR

A. A Conspiracy Existed.

The record in the instant case raises an issue of fact as to the presence of a conspiracy between and among Respondents. Respondents' corporations together constituted a complex multi-corporate structure in which one or more separately incorporated subsidiaries held themselves out as competitors to one another. Respondent International, for example, sold its International brand muffler which was physically identical to the MIDAS Muffler (except for brand) to retailers who were in competition with Petitioners who purchased the MIDAS brand muffler from the Respondent MIDAS. Respondent MIDAS would not sell its MIDAS Muffler to retailers who purchased the International muffler, and International would not sell its muffler to the MIDAS franchisees. Then, under such circumstances Petitioners have for the purposes of summary judgment established a conspiracy within the meaning of Section 1 of the Sherman Act. See, e.g., *Hawaiian Oke & Liquors, Ltd. v. Joseph E. Seagram & Sons, Inc.*, 272 F.Supp. 915 (D.C. Hawaii, 1967); *Nelson Radio and Supply Co. v. Motorola*, 200 F.2d 911, 914 (C.A. 5, 1952). In *Nelson Radio*, supra, the Court said:

> ". . . and, of course, a corporation and its subsidiaries can be guilty of a conspiracy in restraint of trade, but that involves separate corporate entities . . ." (at 914)

In the instant case a parent corporation controls separately incorporated subsidiary corporations. The subsidiary corporations and the parent corporation hold themselves out as competitors of one another. They sell merchandise to competitors of one another. Surely such corporations can conspire. Surely the officers of MIDAS have conspired with

the officers of International Parts Corporation and with each other when they jointly established a system of distribution which insulated their respective customers from one another through franchise agreements.

The conspiracy here is precisely the type of conspiracy which the Court condemned in *Kiefer-Stewart, Co.*, supra. In that treble-damage action under Section 1 of the Sherman Act, the defendants Seagram and Calvert were affiliated companies. Defendants argued, as Respondents here have argued, that they were a single business entity. The court rejected this argument:

> "Respondents next suggest that their status as 'mere instrumentalities of a single manufacturing merchandising unit' makes it impossible for them to have conspired in a manner forbidden by the Sherman Act. But this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. E.g. United States v. Yellow Cab Co., 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010. The rule is especially applicable where, as here, respondents hold themselves out as competitors." (at 261)

Circuit Judge Cummings in his dissenting opinion below recognized the applicability of the language quoted above from *Kiefer-Stewart,* supra. Judge Cummings stated [226]:

> "With respect to the majority's alternative basis . . ., this record shows that MIDAS and International held themselves out as separate and 'divorced'. Therefore Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 71 S.Ct. 259, does not permit defendants to claim that as a single business entity they were unable to conspire."

B. The Sherman Act Condemns Contracts in Restraint of Trade. Conspiracy Is Not Essential to a Claim Under Section 1 of the Sherman Act.

Assuming, *arguendo*, that the facts in the record disclose no conspiracy, this itself does not warrant the issuance of summary judgment in favor of Respondents. The impact of Section 1 of the Sherman Act is not limited to conspiracies. Section 1 is written in the disjunctive and condemns contracts *or* combinations in the form of trusts or otherwise in restraint of trade as well as conspiracies. The facts in the record of the instant case clearly show an agreement in restraint of trade. Indeed, the record shows hundreds of such agreements between Respondents and their franchisees. These agreements are within the prescription of Section 1 of the Sherman Act as well as Section 3 of the Clayton Act. See, e.g., *Simpson v. Union Oil Co.*, supra; *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (C.A. 9, 1964).

Again, Circuit Judge Cummings recognized that [226]:

> "Under *Simpson v. Union Oil Co.*, 377 U.S. 13, and *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, a conspiracy is not needed to support Count I [alleging a violation of Section 1 of the Sherman Act]."

It was plain error for the Court below to ignore these agreements and dismiss Petitioners' Sherman Act count by simply asserting that Petitioners had not shown a conspiracy when proof of a conspiracy was not essential to Petitioners' claim.

IV

PETITIONERS' RIGHT TO A DECISION ON THE MERITS WAS DENIED BY SUMMARY JUDGMENT EVEN THOUGH THE RECORD DISCLOSED DISPUTED ISSUES OF FACT.

The summary judgment of the District Court conflicts with the decisions of this Court which grant private antitrust plaintiffs the right to a decision on the merits: *Radovich v. National Football League,* supra; *Klor's v. Broadway-Hale,* supra; *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 82 S.Ct. 486 (1962); *Continental Ore Company v. Union Carbide Corporation,* 370 U.S. 690, 82 S.Ct. 1404 (1962); *Simpson v. Union Oil of California,* supra. It was erroneous for the Court below to affirm the summary judgment entered by the District Court.

The record shows that Petitioners and Respondents were and are ready for trial. Discovery by both Respondents and Petitioners has been completed. Moreover, the decision of the Court below will not eliminate the necessity for trial of this complex matter since the antitrust ramifications of Petitioners' claim for damages arising from Respondents' violations of the Robinson-Patman Acts were remanded for trial.

The Court below segmented Petitioners' antitrust claims as well as the record and refused to look at the full fabric of Respondents' unlawful system of distribution and Petitioners' claims based thereon. Having found as a "fact" that Petitioners "consented" to Respondents' franchise agreement, for example, the Court ignored the legal significance of Petitioners' evidence of coercion even though it held that subsequent coercion existed.[33] The fact that Petitioners signed

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[33]The Court below said (unanimously) that the District Court's finding that Petitioners "'were free to purchase either product [i.e. Respondents' other muffler] but chose Midas' [was] erroneous." "The record," it said, "contains much evidence that there was a continuous effort on the part of Midas to enforce the exclusive dealer requirement." [219]

franchise agreements constitutes only one piece of evidence. The fact that Respondents coerced Petitioners into compliance with unlawful provisions in their franchise agreements is another. Indeed, it was not the Petitioners' entering into Respondents' franchise agreement but, rather, the Respondents' subsequent enforcement of the terms of that franchise agreement which constitutes the gist of the offense of which the Petitioners complain. The existence of legal coercion is something that should have been decided on the basis of all evidence, not simply the signing of the agreement. If all facts were taken into consideration on the coercion issue, it is entirely possible and even probable that a jury would reach the conclusion that *in pari delicto* did not apply. See *Goldlawr Inc. v. Shubert,* CCH Trade Cases 1967 ¶ 72,147 (E.D. Pa., 1967). The existence of this genuine issue of fact precluded summary judgment.

The record disclosed other genuine issues of major and material fact with respect to the existence of conspiracy as well as with respect to whether Petitioner Pierce's [133, 199, 200, 201] franchise was terminated on an "agreeable basis."

In view of these genuine issues of fact, the case was not ripe for summary judgment. The Court below should have reversed the District Court's decision.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully urge that the decision of the United States Court of Appeals for the Seventh Circuit be reversed.

Respectfully submitted,

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